No. 82-1501

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMALIA MUSICO,

Petitioner,

v.

FRANCIS G. MUSICO, JR., individually and as Personal Representative of the Estate of Francis G. Musico, Deceased,

Respondent.

On Writ of Certiorari to the District Court of Appeal, Fourth District, Florida

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari should be denied because the Florida trial and appellate courts in good faith considered and construed New York law and did not deny full faith and credit?

2. Whether certiorari should be denied because the federal constitutional question was not timely or adequately raised in the Florida courts?

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Respondent FRANCIS G. MUSICO, JR., Individually and as Personal Representative of the Estate of Francis G. Musico, Deceased, respectfully requests that the Petition for Writ of Certiorari to review the judgment and opinion of the District Court of Appeal of the State of Florida, Fourth District, entered September 8, 1982, with rehearing denied December 10, 1982, be denied.

JURISDICTION

Respondent submits that Petitioner is not entitled to certiorari jurisdiction under 28 U.S.C. § 1257(3) because there was no denial of full faith and credit and, even if there were, the issue was not timely or adequately raised in the courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner accurately quoted provisions of the United States Constitution and applicable New York Statutes. (Pet., p. 2-3)

STATEMENT OF THE CASE

The Statement of the Case contained in pages 3-5 of the Petition for Certiorari is generally accurate. However, several additions and clarifications are required.

The trial court specifically found that the Prenuptial Agreement was executed in accordance with the formalities of New York law because Attorney Dinkes was "an original subscribing witness" who properly added his sworn acknowledgement to prove the execution of the instrument after the death of one of the parties. (Pet. App. B, para. 6) The judgment did not indicate that Dinkes "supervised" the signing. It did find that Petitioner entered into the agreement "knowingly . . . .; that there was no duress; and that Petitioner's complaints about the agreement during marriage seem to fortify the conclusion that she understood the provisions of the agreement when she executed it." (Pet. App. B, para. 3) It was recognized under New York Real Property Law § 292 (Pet., p. 3) that although the agreement was properly executed and witnessed, it had to be either "acknowledged" by the person who executed it or "proved" under oath by an original subscribing witness. (Pet. App. B, para. 6) Mr. Dinkes' proof was received by the trial court in the form of an Affidavit attached to Respondent's "Response to Petition for Determination of Pretermitted Spouse Status." (Resp. App. A, p. 3a)

The authenticity of Dinkes' Affidavit was not made an issue at trial. However, Petitioner, citing certain New York cases, unsuccessfully argued that the trial court should not accept the Affidavit because it was executed after the death of Francis G. Musico. The trial court

distinguished Petitioner's New York cases and relied on New York cases offered by Respondent in finding that the formal acknowledgment by an original subscribing witness was proper proof under New York law in a situation involving a prenuptial agreement. (Pet. App. B, para. 1 and 6; Pet. App. C, para. 1) The Florida District Court of Appeal agreed, citing the same New York cases referenced in the trial court's opinion, and found that Petitioner's "allegations of procedural irregularities in the execution of the agreement are without merit." (Pet. App. A, p. 2a) This statement paralleled and affirmed the opinion of the trial court which had recited that "Petitioner's claim that the law of New York was not complied with as to technical requirements relative to a subscribing witness is without merit . . . ." (Pet. App. B, para. 6) Clearly, both courts found that the procedure used to execute, witness, and later formally prove the prenuptial agreement did not violate New York law. Nothing in the District Court of Appeal opinion indicated that the Florida court categorized New York law regarding formalities of execution as "procedural" to distinguish it from that which is "substantive" or that it sought to evade giving full faith and credit to New York law.

REASONS FOR DENYING THE WRIT

I. FLORIDA'S JUDICIAL CONSTRUCTION OF NEW YORK LAW, WITHOUT QUESTIONING ITS VALIDITY, DID NOT DENY FULL FAITH AND CREDIT.

At page 6 of her brief, Petitioner argued that the applicable New York law was "misconstrued" by the Florida courts and that this misconstruction or "misapplication" amounted to a denial of the "full faith and credit . . . to the public acts, records, and judicial proceedings" of the State of New York, required by Section 1, Article IV, of the Constitution of the United States.

Misconstruction would not provide sufficient grounds upon which to rest jurisdiction of this Court. The mere

construction by the highest court of one state of a statute of another state, without questioning its validity, does not deny the full faith and credit required by the United States Constitution. *Glenn v. Garth*, 147 U.S. 360, 368-369 (1893) and its progeny.[1]

A. The Florida Courts Correctly Construed New York Statutes and Cases In Allowing An Original, Non-Party Subscribing Witness To Attest To And "Prove" The Execution Of A Prenuptial Agreement After The Death Of A Subscribing Party.

Petitioner argues that a favorable construction of the New York statute was mandated and that the Florida decision for Respondent denied full faith and credit. However, a plain reading of the statutes quoted at pages 2 and 3 of Petitioner's Brief reflects no prohibition against proof of a document's execution through an original subscribing witness after the death of a party. It was incumbent upon the courts of Florida, after receiv-

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[1] Cases following *Glenn v. Garth* include *Lloyd v. Matthews*, 155 U.S. 222, 227 (1894) *Banholzer v. New York Life Insurance Company*, 178 U.S. 402, 406 (1900); *Johnson v. New York Life Insurance Company*, 187 U.S. 491, 495-496 (1903); *Finney v. Guy*, 189 U.S. 335, 340 and 344 (1903); *Allen v. Alleghany Company*, 196 U.S. 458, 463 (1905). The manner in which the statute is construed does not raise a federal question. *See Johnson, supra* at 496; *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917). These early "writ of error" cases remain applicable in testing certiorari jurisdiction under the Full Faith and Credit Clause. Although Section 25 of the First Judiciary Act of September 24, 1789, c.20, 1 Stat. 73, 85-87 was amended several times and ultimately replaced by the current 28 U.S.C. § 1257, the language was not greatly altered and "it was not intended to effect any change in the prior jurisdiction." 16 Wright, Miller, et al., *Federal Practice and Procedure* § 4006, p. 546, footnote 11 and accompanying text. (West Publishing Co. 1977) An intermediate version of the statutes, stating that certiorari would provide the same power and authority and would have like effect to a writ of error, was ultimately deleted as unnecessary.

ing in evidence the New York statutes and case law in question, to determine their effect. "While statutes and decisions of other states are facts to be proved, . . . when proved, their construction and meaning are for the consideration and judgment of the courts in which they have been proved." *Eastern Building and Loan Association v. Williamson*, 189 U.S. 122, 126 (1903).

The Petitioner had cited the New York cases she thought to be controlling and the trial court had considered and distinguished them in the first numbered paragraph of its Order Denying Petitioners' Motion for Summary Judgment and Judgment on Pleadings. (Pet. App. C, para. 1) The pertinent comments of that order were adopted by reference in paragraph 1 and the distinction was further reiterated in paragraph 6 of the Judgment now appealed.[2] (Pet. App. B, para. 1 and 6) Both the trial court and the District Court of Appeal relied upon the applicability of two New York cases constru-

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[2] Petitioner's cases were actually distinguishable on two (2) separate bases:

(1) Unlike *Maul* and *Stegman* (the New York cases relied upon by the Florida courts below and fully cited in text, *infra*), *In re: Warren's Estate*, 16 A.D.2d 505, 229 N.Y.S.2d 1004, *aff'd*, 236 N.Y.S.2d 628, 187 N.E.2d 478, 12 N.Y.2d 854 (1962) (hereinafter *Warren*), and the other cases cited by Petitioner involved situations where there had been *NO* subscribing witnesses at all. Where there had been no non-party witness who could be asked to "prove" the document, the New York courts decided a surviving spouse could not be made to witness against himself or herself. *Warren, supra.* Rather than overrule *Maul, Warren* pointedly distinguished the case on this basis, and later New York decisions have continued to cite and either follow or distinguish *Maul* on its facts. In the case sub judice, there was a subscribing witness. Thus, *Maul* remained applicable, and *Warren* was distinguishable.

(2) The New York cases Petitioner relied upon dealt with separation agreements rather than prenuptial agreements and it is logical to infer that public policy in New York would distinguish between a spouse's postnuptial waiver of earned rights and a prenuptial waiver made in conjunction with or in contemplation of marriage.

ing the New York statutes favorably to Respondent. *In re: Stegman's Estate*, 42 Misc.2d 273, 247 N.Y.S.2d 727 (1964) relying on *In re: Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847, *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429, *aff'd*, 287 N.Y. 694, 39 N.E.2d 301 (1942). (Pet. App. C, para. 1 and Pet. App. A, p. 22) In *Maul*, New York's highest court had affirmed a decision construing New York statutes to permit an original subscribing witness to add a formal acknowledgement after the death of a party. *Maul* has been distingiushed on facts not applicable to the case at bar, but it remains good law and it was properly relied upon by the Florida trial and appellate courts.[3]

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[3] In *Maul*, the New York Court of Appeals clearly showed its approval of an acknowledgement and proof being offered by a subscribing witness after the death of a party. In *Warren*, the sole case relied upon by Petitioner in her Petition for Rehearing to show denial of full faith and credit (Pet. App. D, para. 3), the New York court had the opportunity to overrule its decision in *Maul*, but did not do so. Instead, in its affirmance, New York's highest court recognized the distinctions and pointedly referred to the fact that "the *separation agreement* was not acknowledged by either [spouse] *or* subscribed by *any witness*." *Warren, supra*, 236 N.Y.S.2d at 628 (emphasis supplied). The Appellate Division's decision had already gone out of its way to distinguish *Maul* stating:

> *Matter of Maul's Will* is *distinguishable* from the instant case. There the instrument was *subscribed* by two witnesses at the time of its execution, and it was *one of the subscribing witnesses, not* the surviving spouse, whom the Surrogate required to furnish the acknowledgement.

In re: Warren's Estate, 16 A.D.2d 505, 229 N.Y.S.2d 1004, 1007 (1962) (R.App. 10) (Emphasis Supplied).

Clearly, while *Maul* has been distinguished, it has not been overruled. It remains good law applicable to the case at bar. Long after the *Warren* decision, it continues to be cited and followed in subscribing witness cases. *See In re: Stegman's Estate*, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (1964); *In re: Rubin's Estate*, 48 Misc. 2d 539, 265 N.Y.S.2d 407, 412 (1965); *In re: Palmeri's Estate*, 75 Misc.2d 639 at 643, 348 N.Y.S.2d 711 (1973). *Maul* was distinguished in *In re: Kucera's Estate*, 73 Misc.2d 456, 457-458, 342 N.Y.S.2d 812, 814 (1973) as follows: "While it is true that in *Matter of Maul*, (supra) the instrument was not acknowledged

Clearly, the ruling by the Florida District Court of Appeal constituted a "construction" of the New York law, but not a "denial" of its validity; and as evidenced from its opinion, the District Court meant to follow, not disregard or oppose, the decisions of the New York courts. The general rule is that if a settled construction by a court of last resort of the state enacting a statute is relied upon to control the judgment of the court of another state in interpreting the statute, such settled construction must be pleaded and proved. *Louisville & Nashville Railroad Company v. Melton*, 218 U.S. 36, 51-52 (1910) citing *Eastern Building and Loan Association v. Ebaugh*, 185 U.S. 114, 121-122 (1902). *See also Chicago, Indianapolis & Louisville Railway Company v. Hackett*, 228 U.S. 559, 565 (1913). In the case at bar, Petitioner did not plead and was unable to prove a settled construction in her favor;[4] for the reasons detailed in footnotes 2 and 3 to this brief, the New York decisions actually supported the Florida courts' interpretation. In any event, they had a right to exercise their independent judgment in interpreting the New York statutes as they did. *Louisville and Nashville Railroad Co. v. Melton*, *supra* at 52.

Petitioner attempted to give a meaning to the statutes and decisions of the state courts of New York which she thought to be correct; however, the duty remained with

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before a notary public or any other officer authorized to take an acknowledgment of a deed, it was nonetheless witnessed. Such is not the case here." In New York, a prenuptial agreement must have been *witnessed* by one other than the principal parties prior to the death of one of them but *an original subscribing witness can add his subsequent acknowledgment* after decedent's death and the antenuptial waiver remains valid against the surviving spouse.

[4] Petitioner never pled that there was a settled construction. Merely putting into evidence opinions of the highest court of a state which construed an applicable statute is not the equivalent of specially setting up and proving a settled construction of the law. *Chicago, Indianapolis & Louisville Railway Co. v. Hackett*, *supra* at 565.

the forum court to apply those statutes and decisions to the particular facts and to determine from those statutes and decisions what was in truth the law of the foreign jurisdiction. *See Finney v. Guy*, 189 U.S. 335, 343-344 (1903). The Florida courts did not deny full faith and credit by construing New York law in favor of Respondent.

B. Even If Erroneous, Florida's Construction Of The New York Laws In A Manner Favoring Respondent Did Not Deny Full Faith and Credit.

Even if the Florida courts could be shown to have erred in their construction and application of the New York statutes, a mere error in construction by a state court in an effort to construe the laws of another state is not a denial of full faith and credit, and it would not entitle the Petitioner to invoke the jurisdiction of this Court. *Pennsylvania Fire Insurance Company of Philadelphia v. Gold Issue Mining and Milling Company*, 243 U.S. 93, 96 (1917); *Smithsonian Institution v. St. John, Executor of Wallace C. Andrews, Deceased*, 214 U.S. 19, 33 (1909); *Johnson v. New York Life Ins. Co.*, 187 U.S. 491, 496 (1903); *Banholzer v. New York Life Ins. Co.*, 178 U.S. 402, 408 (1900). As Mr. Justice Fuller noted in his opinion denying jurisdiction to review New York's construction of Virginia laws in *Glenn v. Garth*, 147 U.S. 360, 368 (1893):

> If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes of Virginia. If every time the courts of a State put a construction upon the statutes of another State, this Court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit

> to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated.

As Mr. Justice Holmes later added in *Pennsylvania Fire Ins. Co. of Philadelphia*, *supra* at 96-97: Where there is nothing to suggest one state was not "candidly construing" a foreign state's statutes "to the best of its ability," even if it were wrong, "something more than an error of construction is necessary" in order to entitle a party to come to the United States Supreme Court under Article IV, § 1 (citing *Johnson v. New York Life Ins. Co.*, 187 U.S. 491, 496 (1903); other citations omitted). The Florida trial and appellate courts candidly and logically construed the New York laws to the best of their ability. They did not deny full faith and credit. For this reason, certiorari in this case should properly be denied.

II. THE FULL FAITH AND CREDIT QUESTION WAS NOT TIMELY OR ADEQUATELY RAISED IN STATE COURT.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257(3) that the claimed denial of the constitutional right to full faith and credit have been properly raised in the state court proceedings.

This Court should decline to exercise jurisdiction, since the order from the state appellate court denying the petition for rehearing (where the full faith and credit issue was raised for the first time), did not expressly consider or dispose of the constitutional question. (Pet. App. E.) This Court has previously recognized that where full faith and credit was first raised on a motion for rehearing before the highest Florida court and the motion was denied without opinion on the issue, it "need not determine whether Florida was bound to give full faith and credit . . . since the issue was not seasonably presented to the Florida court." *Hanson v. Denckla*, 357 U.S. 235, 243-

244 (1958) citing *Radio Station WOW, Inc. v. Homer H. Johnson*, 326 U.S. 120, 128 (1944). The rule here is the same.[5] Certiorari should be refused.

A. Petitioner Failed To Plead The Full Faith And Credit Issue As Required By Florida Law.

For purposes of certiorari under 28 U.S.C. § 1257(3), the constitutional title, right, privilege, or immunity must have been "specially set up or claimed." In determining whether the constitutional question was "specially set up or claimed" within the meaning of § 1257 (3), Mr. Justice Harlan noted in his dissent to *Amalgamated Food Employees Union Local 590, et al. v. Logan Valley Plaza, Inc., et al.*, 391 U.S. 308, 334 (1968), that "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues."

It is imperative that the federal question be raised at the proper point in the state court proceedings.[6] *Beck v. Washington*, 369 U.S. 541, 549-552 (1962).[7] Petitioner

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[5] *See Bailey v. Anderson*, 326 U.S. 203, 205-207 (1945), holding that where the Virginia Supreme Court of Appeal refused a writ of error without comment on a constitutional issue being raised for the first time on appeal, the failure to comment did not preserve the issue for further consideration and the U.S. Supreme Court was without jurisdiction.

[6] This Court should deny the petition for writ of certiorari on the assumption that the refusal of the state court to grant a rehearing or certification was based upon the adequate state ground that the constitutional issue was not timely raised in the trial court, as required by state law. *Radio Station WOW, Inc. v. Homer H. Johnson*, 326 U.S. 120, 129 (1944). The Supreme Court is without jurisdiction "when the question of the existence of an adequate state ground is debatable." *Stembridge v. State of Georgia*, 343 U.S. 541, 547-548 (1952).

[7] The *Beck* decision, in holding that an equal protection argument was not timely raised, suggested that in a state requiring constitutional questions to be raised before the trial court, it was not even enough to discuss the interpretation of a statute at the

admitted at page 6 of her brief that she never raised the full faith and credit clause issue at the trial level or even on appeal until her Petition for Rehearing. (Pet., p. 6) Yet, Florida requires that constitutional issues other than those rising to the level of fundamental error be raised before the trial court.[8] *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970); *Marino v. State of Florida*, 392 So.2d 36, 37 (Fla. 2d DCA 1980); *Durcan v. State of Florida*, 383 So.2d 248, 249-250 (Fla. 3d DCA 1980); *Granados v. Miller*, 369 So.2d 358, 360 (Fla. 4th DCA 1979). Ordinarily, "it is a well settled principle of law [in Florida] that one who seeks a constitutional remedy, whether a right or an exemption, has the duty of clearly and positively presenting the issue at the pleading stage." *State of Florida ex rel. Florida State Board of Nursing v. Santora*, 362 So.2d 116, 117 (Fla. 1st DCA 1978). Clearly, Petitioner failed to raise the full faith and credit issue in her pleadings as she did not do so in the trial court at all.[9] Her failure is jurisdictional. The

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trial level. Rather, it should there have been argued "that a restrictive interpretation would be unconstitutional" in order to "suggest that constitutional considerations might compel a different result." *Id.* at 550 and 552, respectively.

[8] It is possible for an intermediate appellate court in Florida to take cognizance of a constitutional issue first raised on appeal and thereby preserve the right of the Florida Supreme Court to decide the issue, but the procedure appears to be limited to the situation where, unlike here, the Florida District Court of Appeal embraces and enters its ruling in favor of the party asserting such constitutional issue. *Matthews v. State*, 363 So.2d 1066, 1067-1068 (Fla. 1978). This Court might have had jurisdiction if "the constitutional question, however tardily raised, [had been] considered and decided" by the Florida appellate court, but it was not. *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 367 (1932). *See Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935).

[9] When the full faith and credit issue was mentioned for the first time in Petitioner's Motion for Rehearing or Clarification to the District Court of Appeal, it was almost presented in the context of an afterthought and certainly was not "specially set up or claimed." (Pet. App. D, para. 3)

mere citation of decisional law of a foreign state without a formal plea of settled construction is not enough to "specially set up" a full faith and credit issue. *See Chicago, Indianapolis & Louisville Railway Co. v. Hackett*, 228 U.S. 559, 565 (1913), explaining that:

> Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved, and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal. *Id., quoting Lousville and Nashville Railroad Co., supra* at 52.

B. Petitioner Does Not Qualify For The "Fundamental Error" Exception.

Petitioner cannot come within the fundamental error exception. Since Petitioner's own brief characterizes the Florida courts' alleged error as constituting a "misconstruction" or "misapplication" of a New York statute, Petitioner can show no fundamental error in the proceedings below, fundamental error being defined by the Florida courts as "error which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford, supra* at 137. That it found no fundamental error was implicit in the language of the Florida Appellate Court in the order denying rehearing when it characterized Petitioner's allegations of "procedural irregularities in the execution of the agreement" as being "without merit." (Pet. App. A, p. 2a)

The decisions of this Court discussed under Point I above make it clear that mere construction by one state of the law of another cannot rise to the level of fundamental error since it cannot constitute a denial of full faith and credit.

C. Petitioner Does Not Qualify For The "Surprise" Exception.

Petitioner has sought to circumvent her failure to raise the constitutional issue below by claiming "surprise." She suggests in pages 4-6 of her brief that the Florida appellate court's use of the word "procedural" somehow negated the New York cases it cited and indicated that the Florida court had ignored the "substantive" law of New York, thus raising the full faith and credit issue "for the first time." However, she has no basis to claim that the District Court of Appeal came to a "surprising" interpretation of the statutes in question, since the same intepretation had been rendered in the trial court below. Thus, it cannot be said that the petition for rehearing presented the first opportunity for raising the issue.

This Court has determined surprise to be lacking in cases involving much more difficult facts than those presented here. In *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935) the majority found an absence of surprise and a lack of jurisdiction despite the dissent of Mr. Justice Cardozo pointing out that in that case "the Supreme Court of Georgia repudiated the [statutory] construction adopted at the trial court and substituted another." *Id.* at 446. Here, the opposite occurred. The appellate court adopted the trial court's construction. Since Petitioner had failed to prove to the trial court the existence of a "settled" construction of the New York statutes in her favor, the affirming decision of the District Court of Appeal could not have been "unanticipated." Petitioner's strained emphasis on the word "procedural" belies the actual reliance of the Florida court on New York substantive law. (Pet. App. A, p. 2a) Jurisdiction should be found wanting.

CONCLUSION

Far from denying full faith and credit, the Florida courts genuinely considered and applied New York laws, citing in both the trial and appellate courts those New York decisions deemed most applicable. Only when unable to convince the Florida courts to agree with her interpretation of New York law did Petitioner belatedly allude to the constitutional issue in a Motion for Rehearing or Clarification and for Rehearing En Banc of the appellate decision. There was no denial of Full Faith and Credit, but even if there might have been, the issue was not timely raised or preserved. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent, Francis G. Musico, Jr., Individually and as Personal Representative of the Estate of Francis G. Musico, Deceased.

* Both Counsel of Record

RESPONDENT'S APPENDIX

IN THE CIRCUIT COURT
FOR THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

PROBATE DIVISION

Case No. 80-0724 CP-02 "J" Reasbeck

IN RE: ESTATE OF FRANCIS G. MUSICO,
Deceased.

RESPONSE TO PETITION FOR DETERMINATION OF PRETERMITTED SPOUSE STATUS

Francis G. Musico Jr., individually, and as Personal Representative of the Estate of FRANCIS G. MUSICO, deceased, for his response to the Petition for Determination of Pretermitted Spouse Status, states as follows:

1. That he denies each and every allegation of the Petition not specifically admitted herein.

2. That the allegations of paragraphs 1, 2 , 3 and 5 are admitted.

3. That he is without knowledge as to the allegations contained in paragraph 4 of the Petition.

4. Answering paragraph 6 of the Petition, he states that the will speaks for itself and denies any allegations inconsistent therewith.

AFFIRMATIVE DEFENSES

1. That the Petitioner, AMALIA MUSICO, entered into a Prenuptial Agreement with FRANCIS G. MUSICO, deceased, prior to their marriage, and said Agreement bars the Petitioner from recovery in this cause. A copy

of the Prenuptial Agreement and subsequent notarization thereof is attached hereto as Exhibit A and incorporated herein by reference.[*]

2. That Florida Statute 732.702 and/or the applicable statutes of the State of New York, bar the Petitioner of recovery herein.

DATED this 20th day of May, 1980.

ENGLISH, MCCAUGHAN & O'BRIEN
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By: /s/ James O. Murphy, Jr.
JAMES O. MURPHY, JR.

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Determination of Pretermitted Spouse Status has been mailed to JAMES D. CAMP, JR., McCune, Hiassen, Crum, Ferris & Gardner, P.A., Attorneys for Petitioner, Post Office Box 14636, Fort Lauderdale, Florida 33302, this 20th day of May, 1980.

/s/ James O. Murphy, Jr.
JAMES O. MURPHY, JR.

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[*] Prenuptial agreement attached to original was omitted in printing because it is contained in Appendix 7 of Petition for Writ of Certiorari.

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

NATHAN DINKES, being duly sworn, deposes and says the following:

That he is an attorney admitted to practice law in the State of New York, that he resides at One Hall Court, Great Neck, New York, that he was personally familiar with and knew Francis G. Musico and Amelia Horacek and was present on the 2nd day of December, 1966, at the time that both Francis G. Musico and Amalia Horacek executed the Antenuptial Agreement dated December 2, 1966, and that his signature as subscribing witness appears on the executed document.

/s/ Nathan Dinkes
NATHAN DINKES

On this 24th day of April, 1980, before me personally came NATHAN DINKES, to me known and known to me to be the individual described in and who executed the foregoing Affidavit; that he executed the same; and that I compared his signature with that of the subscribing witness to an Antenuptial Agreement dated December 2, 1966, and executed by Francis G. Musico and Amalia Horacek, and was fully satisfied that the two signatures compared were those of the same person.

/s/ V. Roger Rubin
V. ROGER RUBIN
Notary Public
State of New York
No. 02RU8695460
Qualified in Nassau County
Commission Expires March 30, 1982